

state to "[p]revent the elimination of fish or wildlife species due to man's activities, ensure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities." California Public Resources Code, section 21101(c). In addition, Section 15065 of the CEQA guidelines requires a finding of significant impact if a project has the potential to "reduce the number or restrict the range of a rare or endangered plant or animal."

DW-44 con't

While burrowing owls are not currently listed as threatened or endangered under the state or federal ESA, these owls are considered to be a state Species of Special Concern under CESA. In fact, CDFG has a Staff Report on Burrowing Owl Mitigation (1995). This report was developed to assist CDFG to analyze, under CEQA, impacts to burrowing owl and develop appropriate mitigation.

Burrowing owls occur in the areas impacted by the LCR MSCP. In fact, the draft version of the MSCP had estimated that up to 729 acres of burrowing owl habitat would be destroyed and 8,132 acres of foraging acres would be lost due to MSCP covered actions and activities. See Administrative Draft, LCR MSCP Biological Assessment, Chapter 5.5.15, 5.6.15 (September 26, 2003) [Attachment A]. Given the prevalence of burrowing owls in both canals and agricultural lands, it is also likely that these activities will also result in the destruction of owl burrows, including immature owls.

In the most recent draft of the LCR MSCP, the discussion of impacts to burrowing owl is conspicuously absent. Gone is any reference to amount and type of habitat lost or impacted. Instead, there is only a brief discussion that burrowing owls will not be significantly impacted as the lands impacted are *only* agricultural lands. DEIS/EIR at 3.4-32.

This about-face in the LCR MSCP in its analysis and treatment of burrowing owls is a glaring omission. First, the deletion of the discussion of impacts violates CEQA's requirement that impacts are fully disclosed and discussed. Second, the loss of 795 acres of owl habitat and more than 8,000 acres of foraging habitat -- due to the conversion of agricultural lands -- should be considered significant and should be mitigated. The state burrowing owl population is on the decline. The population in the lower Colorado River area is the last stronghold of owl populations in California. Indeed, Defenders has petitioned the state of California to list the owl as state threatened. While CDFG declined to list the owl, in its status review, it did note the heavy reliance of owls on agricultural lands, particularly in the Palo Verde and Imperial Valleys. Thus, the LCR MSCP's dismissal of impacts due to the program's limitation to agricultural lands runs counter to what CDFG has stated are essential lands for the continued survival of the burrowing owl in California. See CDFG Evaluation of Petition to List the Western Burrowing Owl (October 2003). [Attachment B.]

In order to satisfy the requirements of CEQA, the project proponents must reanalyze the impacts of this project on the burrowing owl, and make a finding of a significant impact on the burrowing owl. Mitigation should be developed utilizing CDFG's Burrowing Owl Guidelines, including avoiding the destruction of occupied burrows.

- B. The LCR MSCP fails to analyze and mitigate the impacts to burrowing owls pursuant to Fish and Game Code sections 3503 and 3503.5.

DW-45

As discussed above, the Administrative Draft of the LCR MSCP discussed impacts to burrowing owl. These impacts included the possible destruction of occupied burrows/nests if ground-disturbing activities occurred during nesting season. Administrative Draft, LCR MSCP Biological Assessment, p. 5-47. California Fish and Game Code prohibits the take, possession or destruction of the nest or egg of any bird of prey, including burrowing owls. Fish and Game Code Section 3503.5. If the LCR MSCP is permitting ground-disturbing activities during owl nesting season, this project applicants will likely be liable for violating the Fish and Game Code. Therefore, the LCR MSCP must address these possible impacts to burrowing owl by constructing mitigation prohibiting the destruction of nests. These mitigation measures could include surveying prior to ground-disturbing activity.

In addition, as discussed supra at XX, the FWS is prohibited from issuing an incidental take permit for any unlawful activity. If the LCR MSCP will result in the destruction of a burrowing owl nest or egg, it will be in violation of the California Fish and Game code. Until this violation is addressed, the FWS is prohibited from issuing a final incidental take permit.

DW-46

Sticky Buckwheat & Threecorner Milkvetch

DW-47

The LCR MSCP proposes species-specific conservation measures for these plants by providing \$10,000 per year until 2030 for unfunded conservation measures in the Clark County Multi-Species HCP. HCP at 5-80. How is it possible, given that HCPs must assure funding, that an HCP has unfunded conservation measures? The HCP must articulate the likely mitigation activities that would result from \$10,000 going to the rare plant group from the Clark County MSHCP. Also, the Clark County MSHCP cannot use activities from this \$10,000 as mitigation in the Clark County MSHCP.

Water Use & Rights

DW-48

The draft document estimates an annual requirement of approximately 57.4 KAF to establish and maintain the 8,132 acres of LCR MSCP conservation areas (DEIS/EIR at 2-74). Appendix N states "it is assumed that water rights are bought along with private land that is acquired.... It is assumed that half of the lands in public ownership have associated water rights, and that water rights would need to be purchased for habitat creation on the remaining half of public lands." (N-7.) This draft programmatic document fails to provide any assurance that 57.4 KAF of water could be acquired for environmental purposes, nor does it offer any assurance that such water if acquired would be of sufficient priority to guarantee availability during the likely shortage conditions that will recur on the river. During shortage conditions, riparian habitat and listed species will be placed under additional stress, exacerbated by an expected further decline in mean river elevation and resultant drop in associated groundwater levels. Yet it is precisely at these times when habitat and species are placed under additional risk, that the declaration of shortage could decrease the availability of water for habitat maintenance, due both to the priority system and due to political pressure. The LCR MSCP must provide assurances that at least 57.4 KAF of PPR water could be acquired to maintain the habitat it purports will be sufficient for its

purposes. Without such assurances, the created habitat will likely be stranded at the first instance of system shortage, subverting the entire program.⁶

DW-48 con't

Limitrophe Habitat

The LCR MSCP is missing what may be the premier opportunity to conserve species on the Lower Colorado River, which exists in the limitrophe reach of the river, known in MSCP terminology as reach 7. This reach of the Colorado contains stands of Cottonwood-Willow with a much higher density than that found elsewhere on the Lower Colorado, 18% of land cover in the first 10 kilometers below Morelos Dam as compared to 1-2% as a maximum land cover value along the Lower Colorado River between Lees Ferry and Morelos Dam, even in wildlife refuges (Hinojosa-Huerta et al., 2003. Rapid Ecological Assessment of the Limitrophe Zone of the Colorado River, prepared for Environmental Defense) [Attachment C.]. Significantly, these cottonwood and willow trees have established due to recent overbank flooding since 1980, and have been maintained by relatively high groundwater levels. Surface water in reach 7 is a regular feature, providing breeding sites for insects that are food for resident and migrating birds. These conditions have together allowed a healthy native ecosystem to flourish. However, the maintenance of these conditions is not guaranteed, as drought and local groundwater pumping are both likely to deplete the water available to the limitrophe.

DW-49

In fact, the documents overlook several such cumulative impacts to this area. The discussion of the IBWC's Lower Colorado River Boundary and Capacity Preservation Project is vague and misleading (DEIS/EIR at 4-28). In reach 7 of the river, the reach that would suffer significant adverse impacts to hydrological and biological resources due to the planned IBWC action, the MSCP would only create 540 acres of new habitat. The IBWC's planned action could destroy several times this quantity of habitat. It is wrong to state that the cumulative impact would be less than significant, based on a qualitative assumption that the MSCP would balance out the impacts of the IBWC action. While the proposed action potentially might offer a marginal improvement, the net impact would still be significantly (and cumulatively) adverse. Reclamation's YAWRMG Drainage Project will also have undisclosed cumulative impacts on this reach.

DW-50

The LCR MSCP has an opportunity in the limitrophe both to protect habitat whose future is uncertain, as well as to augment this habitat. While the HCP proposes creating cottonwood-willow sites by planting trees and irrigating them, the limitrophe is far better suited to conservation and restoration based on instream flows.⁷ Here, a modest baseflow in the river channel, plus occasional floods, would secure the future of this excellent habitat.

DW-51

The LCR MSCP could contribute significantly to conserving habitat on the Lower Colorado River by adopting a significant ongoing effort to protect and restore the Colorado River limitrophe, specifically a focused effort by the Cocopah Indian Tribe to create an international conservation area (see DEIS/DEIR at 4-24). This process has been underway for several years,

DW-52

⁶ Other statements in the documents confirm the likelihood that adequate water is not available. See DEIS/DEIR at 2-116 (stating that the Lower Colorado River has more water allocated than available).

⁷ Contrary to Reclamation's assertions otherwise, there is nothing in the Law of the River to prohibit instream flows, and Reclamation fails to point to any support. See DEIS/EIR at 2-116.

and is paralleled by an effort in Mexico to protect the Colorado River riparian corridor from the northern extent of the boundary of the Biosphere Reserve of the Colorado River Delta and Upper Gulf of California.

DW-52 con't

We hope that the LCR MSCP can be amended to reflect this opportunity. In addition, we note that the LCR MSCP documents incorrectly characterize both the physical and biological qualities of the limitrophe, reach 7.

1. Throughout the LCR MSCP documents, flows in reach 7, the limitrophe, are erroneously characterized. The text itself is contradictory at times, stating that it "has some flow from dam seepage, but the majority of the reach is generally dry" (3.0-2) and that "much of the flow in the river downstream of Morelos Dam is return flows from upstream irrigation districts" (DEIS/DEIR at 3.9-7). Neither of these statements accurately characterizes the source or quantity of flows in the limitrophe. In general, these flows can be understood to come from a variety of sources, including:
 - a. Seepage from Morelos Dam.
 - b. Flows that are released at Morelos Dam, including both flood flows (which occurred more than 25% of years 1980-2000) and other flows that Mexico chooses not to divert, such as occasional over-deliveries from the United States.
 - c. Irrigation return flows from Mexico.
 - d. Wasteways (at 11 miles and 21 miles) in the United States that release several thousand acre-feet annually in non-flood years (Ruth Thayer, Bureau of Reclamation, personal communication 8/6/04).
 - e. Groundwater flows from both the United States and Mexico. The quantity of groundwater flow into the Colorado River channel in the limitrophe is unknown, however, a recent study demonstrates that depth to groundwater at the edge of the riparian corridor is no greater than 1-2 meters, and that groundwater levels exceed river elevation, suggesting that the direction of flow is into the river (Zamora-Arroyo, et al., 2001. *Regeneration of Native Trees in Response to flood releases from the United States into the delta of the Colorado River, Mexico*. J. Arid Environments 49:1).

DW-53

While most of these inputs are not quantified, the average total flow in the limitrophe in non-flood years 22,000 acre-feet, and in flood years is 2,120,000 acre-feet (Cohen and Henges-Jeck, 2001. Missing Water: The Uses and Flows of Water in the Colorado River Delta Region, Pacific Institute).

2. The importance of reach 7, the limitrophe, for several of the LCR MSCP covered species is neglected:

DW-54

- a. The limitrophe is an important stopover site for migrating southwest willow flycatchers in their migration movements before they reach their breeding grounds (Garcia-Hernandez et al., 2001. Willow Flycatcher (*Empidonax traillii*) surveys in the Colorado River delta: implications for management. J. Arid Environments 49:1). It has been well documented, in general for landbirds, that the quality and availability of stopover sites during migration is one of the key factors determining survivorship rates for these species. The description of this bird in Appendix I, "Status of LCR MSCP Covered Species" fails to mention the importance of stopover sites to this migrant (Appendix I at 1-7).

- b. Other key species of conservation concern in the limitrophe are the Yellow-billed Cuckoo, Arizona Bell's Vireo, and Summer Tanager, all of which were found present in recent surveys of the limitrophe (Hinojosa-Huerta et al., 2003. Rapid Ecological Assessment of the Limitrophe Zone of the Colorado River, prepared for Environmental Defense). Descriptions of these birds in Appendix I, "Status of LCR MSCP Covered Species" fail to mention their presence in the limitrophe (Appendix I at I-49, I-61, and I-69).

DW-55

The applicants must not only demonstrate that the conservation plan is practicable, but that additional mitigation measures are impracticable. See *National Wildlife Federation v. Babbitt*, 128 F.Supp.2d 1274, 1292 (E.D. Cal. 2000); *Sierra Club v. Babbitt*, 15 F.Supp. 2d 1274 (S.D. Ala. 1998). The suite of documents omits any discussion of why additional minimization, mitigation, or recovery measures are or are not practicable for the native fish, for the burrowing owl, or the sticky buckwheat and threecorner milkveich. The same questions must be asked of the \$10,000/year for the humpback chub. Nor is there a finding that conservation activities in the Colorado River delta are impracticable.

DW-56

The Applicants have not demonstrated that adequate funding will be available

DW-57

Indeed, the parties have not demonstrated that any funding will be available. The ESA requires the MSCP Conservation Plan specify "the funding that will be available to implement [minimization and mitigation of impacts]" and that the applicant "ensure that adequate funding will be provided [post-public comment]." 16 U.S.C. § 1539(a)(2)(A)(ii), 1539(a)(2)(B)(iii); 50 C.F.R. § 17.22 (b)(1)(iii)(B). The LCR MSCP applicants must ensure funding is available to implement the mitigation measures.

On the contrary, the applicants here say only, "If the permit is granted, the Applicants will ensure sufficient funding to implement the LCR MSCP . . ." HCP at 1-5 (emphasis added). It is admitted in the documents that the percentage of costs borne by each party and the sources of funding from each party have not been agreed upon. See HCP at 6-1 (JPA will establish cost-share and funding sources); HCP at 7-9 (parties are considering approaches to assure funding).

In short, although they must "detail the funding" available, 63 Fed. Reg. at 8864, the parties have neither committed to nor even offered funding strategies to assure funding this 50-year program. There are no development fees, mitigation fees (surcharges), contributed funds, state or federal funds, assessment districts, or tax check-off programs (See e.g., HCP Handbook at 3-34). The HCP does not establish the sources of funding, how much any source would or could provide, or whether it is likely to be acquired. FWS cannot rely on speculative funding for an HCP. *National Wildlife Federation v. Babbitt*, 128 F.Supp.2d 1274, 1294-95 (E.D. Cal 2000); *Sierra Club v. Babbitt*, 15 F.Supp.2d 1274, 1282 (S.D. Ala. 1998).

Furthermore, as the HCP acknowledges, when there is permanent loss of habitat, the HCP must provide for protection of habitat in perpetuity. In this case, perpetual funding or an endowment may be necessary, yet is not provided for in the cost estimate. The HCP must establish programs or mechanisms to generate such funds. The HCP must also guarantee

funding for mitigation should habitat destruction occur before the mitigation. | DW-57 con't

The LCR MSCP violates California's prohibition against take of "fully protected" species

DW-58

The LCR MSCP does not fit within the state exemption

Under California law, the "take" of a "fully protected species" is prohibited. *See* California Fish and Game Code sections 3511, 4700, 5050 and 5515. Under the LCR MSCP, three species - the razorback sucker, Yuma clapper rail, and black rail - are proposed to be taken under the MSCP.

The regulations implementing the ESA currently state that the FWS can only issue an incidental take permit under specific conditions, including if the taking is incidental to, and the purpose of, the carrying out of an otherwise lawful activity." *See* 50 Fed. Reg. 39681, 39687 (discussion of 50 CFR §17.3). Here, the strict prohibition against the take of a fully protected species under California law makes it clear that an action in California that results in the take of a fully protected species is unlawful. Therefore, the FWS is prohibited from issuing an incidental take permit for the three fully protected species for activities that will result in take of these species in California. *See* Letter to Gerald Zimmerman, LCR MSCP, from Steven Spangle, USFWS (dated March 9, 2004). [Attachment D.]

Currently, there is an opinion from the California Department of Fish and Game (CDFG) that take of these three species is permitted under state law. *See* Letter to Steven Spangle, USFWS, from Michael Valentine, CDFG (dated April 14, 2004) [Attachment E]. However, this letter is based on an erroneous and flawed interpretation of the California statutes implementing the Quantification Settlement Agreement (QSA).

CDFG argues that Fish and Game Code Section 2081.7 permits the take of fully protected species as part of the LCR MSCP. This code section states that take of fully protected species is authorized if it results from "impacts attributable to the implementation of the Quantification Settlement Agreement." Fish and Game Code section 2081.7(a) (emphasis added). The QSA is defined as the draft agreement, dated December 12, 2000, and as it may be amended, including the transfer of conserved water between Imperial Valley and San Diego, as well as "any QSA-related program that delivers water at the intake of the [MWD]'s Colorado River Aqueduct." Section 1(a) of Chapter 617 of the Statutes of 2002.

Thus, the pivotal question is whether the LCR MSCP fits within the scope of the QSA or a QSA-related program that delivers water to MWD's aqueduct. To begin with, the LCR MSCP originated well before the draft 2000 QSA or the final QSA signed in 2003. The MSCP was put together in an attempt to get long-term ESA permits for activities on the Colorado River. Specifically, this permit is intended to be a continuation of the long-standing - and soon-to-be-expired - biological opinion for activities along the Colorado River associated with delivering water to the lower basin states and Mexico.

An examination of the QSA reveals that this agreement encompasses numerous agreements involving the federal government's allocation of 4.4 million acre feet of water to

California and the four Southern California water agencies, including additional water as a "soft landing" to California over the next 15 years, the allocation of water between the southern California water agencies, a "wheeling" agreement to move water within California, a conservation agreement within California, the IID water transfer documents, funding agreements and court stipulations. Notably absent from the QSA is any discussion or agreement about *how* water will be moved down the Colorado as part of the delivery of water to California. The QSA is not about how water will be moved down the Colorado River, but how California will reduce its use of Colorado River water *within* California. Thus, since the QSA is not about how water is moved down the Colorado River – and its related impacts – then the LCR MSCP is neither part of the QSA or an activity "related" to the QSA.

Assuming *arguendo* that "QSA-related" is read to include the LCR MSCP, the Fish and Game code exemption for take of fully protected species is only for QSA-related activities that deliver water to MWD's aqueduct. The exemption does not include water delivery to any other California delivery point, including Palo Verde Diversion Dam or Imperial Dam, nor does it include non-Federal, non-flow related activities.

Based on a plain-reading of the California statute and an understanding of the QSA, Section 2081.7 of the Fish and Game Code was intended to allow an exemption for the take of fully protected species as it pertained to the execution of the IID water transfer. This provision was never intended to be so sweeping as to exempt all take of fully protected species as it pertains to the operation of the Lower Colorado River.

The LCR MSCP does not fulfill the requirements to be granted an exemption

DW-59

Assuming that the LCR MSCP is somehow found to be a "QSA-related" activity that could be exempted from the fully protected species take prohibition, the LCR MSCP does not meet the requirements to be granted the exemption. Section 2081.7(a) provides that take of a fully protected species may be permitted as long as the conditions in subdivisions (b), (c) and (d) are fulfilled. Fish and Game Code Section 2081.7(a). These three subdivisions require that (1) the QSA is executed before October 12, 2003; (2) CDFG has determined that agreements have been executed to address environmental impacts at the Salton Sea; and, most relevant to the LCR MSCP, (3) the incidental take requirements of the California Endangered Species Act (CESA) have been met, adaptive management process has been developed and implemented and that this adaptive management process "substantially contributes to the long-term conservation" of the species.⁹

⁹ Under CESA, CDFG may authorize, by permit, the take of endangered species, threatened species, and candidate species if all of the following conditions are met:

- (1) The take is incidental to an otherwise lawful activity.
- (2) The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.
- (3) The permit is consistent with any regulations adopted pursuant to Sections 2112 and 2114.

A review of the LCR MSCP and its accompanying documents reveals that no finding has been made that the MSCP has met any of the above requirements, particularly the CESA incidental take permit requirements. Indeed, any discussion of CESA is noticeably absent from the LCR MSCP.

DW-59
con't

In order for the take of the three fully protected species to be exempted under state law, the FWS and/or CDFG needs to make a finding that the LCR MSCP meets the exemption requirements of Section 2081.7 of the Fish and Game Code, including that the MSCP satisfies CESA and that the MSCP will "substantially contribute to the long-term conservation of the species." As discussed *supra*, since the LCR MSCP fails to meet the federal ESA's minimal take requirements, this program also fails to meet the stricter "fully mitigate" standard of CESA and "long-term conservation" standard of Section 2081.7.

LCR MSCP fails to address the California Endangered Species Act and the take of state listed threatened and endangered species

DW-60

The LCR MSCP Draft EIR/EIS provides a laundry list of various state laws that are implicated by the activities covered in the MSCP. Conspicuously absent is any reference to the California Endangered Species Act (CESA). Despite the fact that the LCR MSCP will "take" a number of state listed species, including the Yuma clapper rail, black rail, desert tortoise, razorback sucker, gila woodpecker, and elf owl, there is no discussion of the need to obtain incidental take permits under CESA or the state Natural Community Conservation Planning (NCCP) Act. *See* Chapters 1.4.2 and 7.1.3 of the DEIS/EIR (discussion of future permits and approvals required to implement the LCR MSCP projects fails to include a reference to CESA).

As discussed above, *supra*, in order to issue a federal incidental take permit, the activity being permitted must be lawful. Until CDFG issues take permits under either CESA or the NCCP Act, any activities that result in the take of any California listed species will be illegal. Therefore, the final approval by FWS of the LCR MSCP is linked with the final approval by CDFG of the state take permits. No federal take permit should be issued without the state take permit.

(4) The applicant shall ensure adequate funding to implement the measures required by paragraph (2), and for monitoring compliance with, and effectiveness of, those measures.

No permit may be issued pursuant to subdivision (b) if issuance of the permit would jeopardize the continued existence of the species. The department shall make this determination based on the best scientific and other information that is reasonably available, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities.

Cal. Fish and Game Code section 2081(c), (d).

Implementing Agreement Must Be Issued for Comment Before Any Permit Is Issued

DW-61

An Implementation Agreement (IA) is "an agreement that legally binds the permittee to the requirements and responsibilities of a conservation plan and section 10 permit. It may assign the responsibility for planning, approving, and implementing the mitigation measures under the HCP." Handbook at 8-3. The Agreement is a key piece of the MSCP as it contractually binds the parties to the Conservation Plan and will supersede BA Section 2.8.2 and HCP chapter 8. As such, it must be subject to public notice and comment.

According to the HCP Handbook, the implementing agreement (1) must be provided before the Federal Register notice can be published (6-4), (2) should be submitted as part of complete application package and usually included as appendix to HCP, (3) should be included with the complete package so public can understand how implementation of HCP will be managed, (4) should be included when HCP provided for public comment (6-5), and (5) should be reviewed by all signatories to it and be agreed to by all non-federal signatories before sent to the Regional Office as part of the HCP application (6-8). None of these five requirements has been met.

As indicated by the MSCP documents, an Implementing Agreement "will be prepared" that "will describe assurances and other commitments" as well as "changed circumstances," BA at 2-102, and "will specify the legal obligations, roles, and responsibilities of each signatory." HCP at 7-9. The Implementing Agreement is in the title of the Federal Register notice, but not included in the HCP, BA, EIS or Appendices. The complete application package, including the Implementing Agreement, must be available for public notice and comment. 16 U.S.C. § 1539(c). Since the public has not been allowed to comment on the IA, FWS and Reclamation must publish notice of it and reopen the public comment period.

The HCP also states that a JPA will be prepared that will also define the implementation and management of the MSCP, as well as establish the funding assurances required by the ESA. HCP at 6-1. This agreement must also be available for public comment, as it defines key elements - Steering Committee; voting; compliance with ESA permits - to implementation of the LCR MSCP.

"No Surprises"

Reclamation has pooled Federal and non-Federal covered actions, particularly those that are flow-related, in the belief that it is difficult to parse out the effects from federal activities from those that are not, and relatedly, because of uncertainty as to whether activities should seek section 7 or section 10 coverage, *see* BA at 2-2, 3-2. *See also* BA at 5-2 ("The effects of Federal flow-related activities addressed in the LCR MSCP BA cannot be separated from the effects of non-Federal flow-related activities addressed in the LCR MSCP HCP. Therefore, the impact analysis for flow-related activities encompasses both Federal and non-Federal flow-related activities, and the analysis and results are the same in the LCR MSCP BA and the LCR MSCP HCP") and HCP at 2-2 ("The effects of all covered Federal and non-Federal activities, whether discretionary or not, have therefore been described and covered in this LCR MSCP HCP, as well as in the LCR MSCP BA prepared by Reclamation").

DW-62

Although their fate and form are entirely uncertain given the court injunction prohibiting issuance of ITPs with No Surprises and the lack of a draft IA, the HCP applicants are seeking assurances. What the documents fails to address is how FWS can provide assurances to the applicants when non-Federal and Federal activities have been combined into one set of covered actions and federal agencies cannot obtain assurances. See 50 C.F.R. § 17.22(b)(5).

DW-62 con't

Any assurances included in an incidental take permit should be based on the nature and duration of the covered actions, the adequacy of the available science, the proposed conservation plan, the adaptive management provisions in the conservation plan, and the contribution of the plan to recovery of the species. In light of the comments and questions above, if No Surprises is appropriate for the LCR MSCP, any assurances, in addition to requiring public notice and comment, must be limited in scope and duration. Furthermore, the LCR MSCP documents must make clear that the FWS cannot approve an ITP containing No Surprises assurances until FWS completes the rulemaking for revocation of ITPs.

Miscellaneous

BA at 1-2; HCP at 1-1	Fix cite for Arizona v. California by deleting "Code [USC]"	DW-63
BA at 1-10	Table 1-2 missing	DW-64
BA at 2-31	Proposed second level shortage is 915 ft msl - is this a typo?	DW-65
BA at 2-32	Tables 2-21, 2-22, 2-23 are missing	DW-66
BA at 2-49	Table 2-25 is missing	DW-67
BA at 5-89	Line 18, delete "Code"	DW-68
BA at 2-3	Please note that flood control shares the first priority with river regulation and navigation	DW-69
BA at 2-31	Replace proposed second level shortage of 915 ft with 950 ft.	DW-70
BA at 4-26	Line 17-18, clarify that the QSA has been executed and adjust reasoning for no deliveries of surplus water accordingly	DW-71
BA at 5-14	Line 2, Clarify that effects are from extending the ISG, and the shortage criteria and the future flow-related covered activities	DW-72
HCP at 1-1	Figure 1-1, the Colorado River basin includes a portion of the Republic of Mexico	DW-73
HCP at Table 5-1	Replace bonytail with razorback sucker in biological goal (this occurs throughout the documents)	DW-74
HCP at 5-40	Line 37: replace BOCH with BONY (this appears throughout)	DW-75
EIS/EIR at 3.9-9	Please update the most recent salinity control forum review as of 2002, and reflect any changes in the analysis	DW-76
App. I.B-1	Replace Tables 2-11a, 2-11b, 2-11c with Tables 2-21, 2-22, 2-23 (assuming these are the intended tables)	DW-77

Thank you for accepting the above comments. We look forward to seeing our concerns | DW-78

Aug 18 04 04:37p

defenders of wildlife 505-248-0187

p.2

addressed and implemented in a revised Draft LCR MSCP documents, including the IA and JPA. **DW-78 con't**
issued for public review. If you have any questions, please contact any of us.

Sincerely,



Kara Gillon
Water Counsel
Defenders of Wildlife
824 Gold SW
Albuquerque, NM 87102

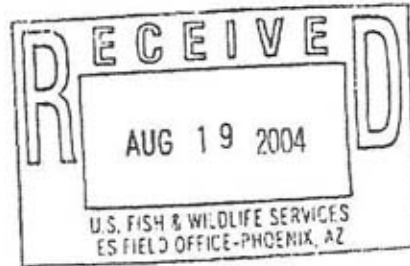
Jennifer Pitt
Senior Resource Analyst
Environmental Defense
2334 Broadway
Boulder, CO 80304

Pamela Hyde
Colorado River Coordinator
Grand Canyon Wildlands Council
P.O. Box 1845
Flagstaff, AZ 86002

Michael Cohen
Senior Research Associate
Pacific Institute
948 North Street
Boulder, CO 80304

Steve Glazer
Chair, Colorado River Task Force
Chair, Rivers Committee
Sierra Club
P.O. Box 459
Crested Butte, CO 81224

Cary Meister
Yuma Audubon Society
P.O. Box 6395
Yuma, AZ 85366



not present. The creation/restoration of yellow-billed cuckoo habitat with implementation of the LCR MSCP Conservation Plan is expected to result in an increase in the numbers and distribution of yellow-billed cuckoos within the LCR MSCP planning area. Consequently, the number of yellow-billed cuckoos exposed to disturbances from these types of non-flow-related activities is expected to increase in future years.

5.5.14.3 Effects of LCR MSCP Implementation

Activities associated with creating/restoring and maintaining created/restored covered species habitat may result in take of the yellow-billed cuckoo. LCR MSCP habitat creation/restoration-related activities could result in harassment of individuals if they are present at the time activities are implemented, but these activities will avoid removal of habitat to establish habitat for other covered species. Habitat management-related activities, such as periodic removal of trees in patches of created/restored habitat to encourage stand regeneration and operation of equipment to maintain roads, could result in temporary loss of habitat and harassment of individuals. Implementation of the LCR MSCP is expected to result in some low, unquantifiable, level of take over the term of the LCR MSCP. The likelihood for take is expected to increase over the term of the LCR MSCP if the abundance of yellow-billed cuckoo increases in the LCR MSCP planning area as a result of implementing LCR MSCP conservation measures for this species. The level of adverse effects on habitats and individuals will depend on the type and extent of LCR MSCP habitat management activities that are undertaken in species habitat.

Implementation of the LCR MSCP Conservation Plan will create/restore at least 4,050 acres of yellow-billed cuckoo habitat to replace habitat that could be lost as a result of covered activities and will increase the amount of protected new habitat by 2,526 acres. LCR MSCP-created/restored southwestern willow flycatcher habitat patches that are larger than 25 acres (Halterman pers. comm.) and support cottonwood-willow types I-III would provide additional habitat for the yellow-billed cuckoo. In addition, the LCR MSCP Conservation Plan will maintain existing important yellow-billed cuckoo habitat areas in the LCR MSCP planning area.

5.5.15 Burrowing Owl

In the LCR MSCP planning area, burrowing owls typically inhabit agricultural fields with extensive dirt embankments and are sometimes found in sandy, open riparian woodlands or desert washes (Rosenberg et al. 1991). Flow-related activities are not expected to affect the burrowing owl because they will not affect agricultural lands, open riparian woodlands, or desert scrub used by the burrowing owl. Flow-related covered activities, therefore, will not result in take of the burrowing owl.